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TANABAL NAIDU MURUGAYAN v. THOO CHEE WAH

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[CIVIL APPEAL NO: PA-12A-1-01-2021]
22 AUGUST 2024

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Abstract – *(i) Order 14A of the Rules of Court 2012 ('ROC') should only be invoked if the facts needed to answer the questions of law or construction of a document are not in dispute. If there are disputed facts, then the O. 14A procedure is not suitable and should not be used to determine a suit; (ii) Similar to O. 14A, O. 33 of the ROC should only be invoked where there are no disputed facts. An order under O. 33 should only be granted if: (a) answering the questions of law or fact would result in a substantial saving of time and expenditure; (b) there are no other issues of law or fact that ought to be decided at the trial of the suit; and (c) if the questions are carefully and precisely framed, such that there is no ambiguity as to what exactly is the real question that is to be answered. Order 33 should also not be utilised when there are issues in the suit that require extrinsic evidence to prove.*

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CIVIL PROCEDURE: *Disposal on point of law – Determination of questions of law – Landlord-tenant suit arising from tenancy agreement – Questions of law and/or fact posed for determination – Whether questions suitable for determination without full trial of action – Whether would determine entire case or matter or any claim or issue – Whether action ought to be dismissed – Rules of Court 2012, O. 14A & O. 33*

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The appellant ('plaintiff'), the landlord, and the respondent ('defendant'), the tenant, had entered into a tenancy agreement for a house for three years. According to the plaintiff, the defendant had made changes to the house and did not restore it to its original condition. The plaintiff had to appoint a contractor to do the restoration work and incurred RM63,907.25 for the works. The plaintiff then sued the defendant, at the Sessions Court, for this sum with interest and costs. The defendant counterclaimed for damages and for the return of the rental and utility deposits. Before the trial commenced, the defendant filed an application, pursuant to O. 14A and O. 33 rr. 2 and 5 of the Rules of Court 2012 ('ROC'), (i) to pose six questions of law and/or fact for the Sessions Court to determine. The questions posed were: (a) whether 'renovation' is equivalent to 'restoration' in law ('question 1'); (b) whether the plaintiff, in law, needs an expert such as a building surveyor or other expert in construction, building or otherwise, to identify and certify that the alleged damage to the subject premises was caused by the defendant ('question 2'); (c) whether the quotation dated 26 February 2018 by the contractor was a confirmation or identification, in law, concerning the

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damage allegedly caused by the defendant to the premises ('question 3'); (d) whether the three payment receipts and the quotation adduced by the plaintiff are, in law, for renovation or restoration of the subject premises ('question 4'); (e) whether the plaintiff and/or the contractor are, in law, experts who are qualified to identify or certify that the damage and the value of the damage amounting to RM38,001 were caused by the defendant to the subject premises ('question 5'); and (f) whether the plaintiff was, in law, entitled to claim rent for December 2017 for RM2,800 and impose on the defendant mesne profits at double rental for January, February, March and April 2018 amounting to RM22,400 when para. 7 of the plaintiff's statement of claim ('SOC') admitted that vacant possession of the subject premises was delivered on 30 November 2017, *ie*, before December 2017 ('question 6'); and (ii) upon the determination of the questions posed, the plaintiff's writ and SOC be struck out. The Sessions Court answered the questions in the defendant's favour and struck out the plaintiff's writ and SOC and ordered the return of the rental and utility deposits. Hence, the present appeal.

Held (allowing appeal):

(1) To persuade the court to utilise the O. 14 procedure in his favour, the defendant must satisfy both these requirements: (i) suitability – it must be suitable for the questions of law or construction of a document to be determined by the court without a trial. This means that the facts required to answer the questions of law or construction of a document must be undisputed, admitted or proven; and (ii) finality – answering the questions of law or construction of a document must necessarily conclude the whole cause of action with finality. There must be no remaining issues or question that still have to be answered through the process of a trial. In other words, answering the questions posed would determine the entire case, *ie*, determine the claim as well as the counterclaim. To persuade the court to utilise the O. 33 procedure in his favour, the defendant must satisfy either of two alternative requirements: (i) substantial disposal – answering the questions of law or fact posed must substantially dispose of the suit; or (ii) a trial is unnecessary – answering the questions of law or fact posed renders the trial unnecessary. Here, in this proceeding, it means that when the court answers the questions posed, both the claim and counterclaim would no longer need to go to trial. (paras 8 & 10)

(2) The six questions posed, taken separately or together, were not questions of law or construction of a document or questions of fact. There should be a trial for parties to: (i) present the evidence of their conduct and to challenge the opposite side's conduct in relation to the parties' rights and obligations under the tenancy agreement; and (ii) establish that the opposite side is the party that has breached the terms of the tenancy agreement. There were numerous disputed facts, which rendered the O. 14A or O. 33 procedures inappropriate. Under

O. 14A, the questions posed by the defendant: (i) were not suitable for determination without a trial; and (ii) did not finally determine the entire case, namely the claim and the counterclaim. Order 33 was even less suitable here. The answers that may be given to the questions posed did not substantially dispose of the matter and did not render the trial unnecessary. Instead, a trial was required to decide on the claim and counterclaim since there were diametrically opposed assertions of facts. The questions posed were incongruous with the purpose and requirements of both O. 14A and O. 33 procedures. (paras 29 & 36-40)

(3) The Sessions Court had disregarded fundamental principles of procedural law and substantive justice. The Sessions Court order was set aside. The Sessions Court was directed to call this matter up for case management at the earliest opportunity and, in any event before 19 July 2024, for the Sessions Court to case-manage the suit to progress it to trial. (paras 42-44)

Case(s) referred to:

Dominic J Puthucheary v. Jet Age Construction Sdn Bhd & Anor & Another Appeal [1997] 3 CLJ 807 CA ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal [2012] 1 CLJ 49 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 93, 94

Rules of Court 2012, O. 14A, O. 33 rr. 2, 5

For the apellant - M Kanesan & K Shaarmila; M/s M Kanesan & Assocs

For the respondent - Jason Ong; M/s Ong & Assocs

Reported by Najib Tamby

JUDGMENT

Kenneth St James JC:

Prelusion

[1] This Sessions Court suit is a landlord-tenant suit. In September 2014, the parties entered into a tenancy agreement. The plaintiff (P), as landlord, rented his house to the defendant (D), as tenant, for three years.

[2] The tenancy agreement provides that:

(i) D must not sublet the house;

(ii) D must not make any structural or material changes to the house;

(iii) if there are structural or material changes to the house, D must restore it to its original condition at his own cost and expense; and

(iv) when the tenancy expires or ceases, D must return the house "in such good and substantial repair".

[3] P asserts that D made changes to the house; D did not restore the house to its original condition; P appointed a contractor to do the restoration work; and P incurred RM63,907.25 for the works. P sues D for this sum with interest and costs.

[4] D files a defence and counterclaim. D's counterclaim is for:

(i) a declaration that D did not cause any "damage or defects" (kerosakan atau defeks) to the house;

(ii) the return of a front door (that does not belong to P), or RM5K damages relating to the front door;

(iii) the return of the rental and utility deposits;

(iv) damages for malicious prosecution and abuse of the process of the court;

(v) "contemptuous damages"; and

(vi) damages to be assessed.

[5] Before the trial of the Sessions Court suit, D filed encl. 65 – D's application under O. 14A and O. 33 r. 2 and r. 5 of the Rules of Court 2012 (ROC 2012):

(i) to pose six "questions of law and/or fact" for the Sessions Court to determine; and

(ii) on determining the questions posed, P's writ and statement of claim be struck out, if the Sessions Court "thinks it fair, just and fit" (adil, patut dan sesuai).

[6] The Sessions Court answered the questions in D's favour, and as a consequence, struck out P's writ and statement of claim, ordered the return of the rental and utility deposits, and ordered P to pay RM5K costs to D.

The Terms Of O. 14A

[7] To analyse O. 14A of the ROC 2012, the terms of O. 14A are set out below for reference (with my emphases in bold):

> **Order 14A. Disposal of case on point of law**
>
> **Determination of questions of law or construction (O. 14A, r. 1)**
>
> (1) **The Court may**, upon the application of a party or of its own motion, **determine any question of law or construction of any document** arising in any cause or matter at any stage of the proceedings **where it appears to the Court that** –

A (a) **such question is suitable for determination without the full trial** of the action; **and**

(b) **such determination will finally determine the entire cause or matter or any claim or issue** therein.

B (2) **On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just** … (emphasis added)

[8] To persuade the court to utilise the O. 14A procedure in his favour, D must satisfy both of these requirements:

(i) suitability – it must be suitable for the questions of law or construction C of a document to be determined by the court without a trial. This means that the facts required to answer the question of law or construction of a document must be undisputed, admitted, or proven; and

(ii) finality – answering the questions of law or construction of a document must necessarily conclude the whole cause of action with finality. There D must be no remaining issues or questions that still have to be answered through the process of a trial. In other words, answering the questions posed will determine the entire case *ie*, determine the claim as well as the counterclaim here.

[9] To analyse O. 33 rr. 2 and 5 of the ROC 2012, they are set out below E for reference (with my emphases in bold):

Order 33. Mode of trial

Time of trial of questions or issues (O. 33, r. 2)

2. **The Court may order any question or issue** arising in a cause or matter, F **whether of fact or law or partly of fact and partly of law,** and whether raised by the pleadings or otherwise, **to be tried** before, at or after the trial of the cause or matter, **and may give directions as to the manner in which the question or issue shall be stated.**

Dismissal of action after decision of preliminary issue (O. 33, r. 5)

G 5. **If it appears to the Court** that **the decision of any question or issue** arising in a cause or matter and tried separately from the cause or matter **substantially disposes of the cause or matter** or **renders the trial** of the cause or matter **unnecessary,** it **may dismiss** the cause or matter **or make such other order or** give such **judgment** therein **as may be just.**

H **[10]** To persuade the court to utilise the O. 33 procedure in his favour, D must satisfy either of two alternative requirements:

(i) substantial disposal – answering the questions of law or fact posed must substantially dispose of the suit; or

I (ii) a trial is unnecessary – answering the questions of law or fact posed renders the trial unnecessary. Here, in this proceeding, it means that when the court answers the questions posed, both the claim and counterclaim will no longer need to go to trial.

The Case Law On O. 14A And O. 33

[11] Further, to the clear requirements prescribed by the express words of O. 14A and O. 33, case law authority elaborated on the utilisation of O. 14A and O. 33. From case law authority, I glean the following principles.

[12] One – O. 14A should only be used, that is, an order under O. 14A should only be granted if the facts needed to answer the questions of law or construction of a document – are not in dispute. If there are disputed facts, then the O. 14A procedure is not suitable, and should not be used to determine a suit – *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49; [2012] 2 MLJ 299; [2012] 1 AMR 489; [2012] 4 MLRA 87; at paras. [47] and [48].

[13] Two – similar to O. 14A, the O. 33 procedure should only be invoked where there are no facts which are in dispute – *Dominic J Puthucheary v. Jet Age Construction Sdn Bhd & Anor & Another Appeal* [1997] 3 CLJ 807; [1997] 2 MLJ 252 at MLJ p. 262; [1997] 1 AMR 101; [1995] 2 MLRA 539.

[14] Three – O. 33 should only be used, that is, an order under O. 33 should only be granted – (i) if answering the questions of law or fact will result in "a substantial saving of time and expenditure"; (ii) if there are no other issues of law or fact that "ought to be decided at the trial of the suit"; and (iii) if the questions are "carefully and precisely framed", such that there is no ambiguity as to what exactly is "the real question" that is to be answered – *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8; [2003] 5 AMR 696; [2003] 1 MLRA 582; at para. [16].

[15] Four – O. 33 should not be utilised when there are issues in the suit that require extrinsic evidence to prove. Put differently, where there are issues that arise out of the pleadings which are traversed (denied, refuted) and extrinsic evidence is needed for the parties to prove or traverse them at trial, then the O. 33 procedure is not suitable to use – *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; [1991] 3 MLJ 474 at MLJ p. 480; [1991] 1 MLRA 163.

Summary Of The Competing Positions Taken By P And D

[16] I think it is pertinent to summarise the two competing positions taken by P and D in this suit. This is P's position – D rented P's house. P discovered that D was subletting it out for a homestay business. D was not permitted to do that. D departed from the agreed usage of the house as a "residence". D structurally or materially changed the house by renovating it. P never agreed to any renovation. D should not have renovated the house. P had to restore the house back to its original design. P claims from D the restoration cost.

[17] D's position is this – after D returned the house to P, instead of restoring the house, P "renovated" the house. P did not merely pay for restoration. P paid for "renovation". The documentary evidence – the quotation and the payment receipts given by the contractor to P described the works done as "renovation".

[18] Also, D requested further and better particulars from P. P's answer to D's request for further and better particulars confirms that P did "renovation" works to the house. The "renovation" works were not works to restore the house to its original state. As such, P cannot claim from D the money that P spent on "renovation" works (works which improved the house).

[19] P's response to D's position is that – the words used in the quotation such as "make good to wall", "check and repair/replace to existing powerpoint and lights", "diamond cut broken floor tile and make good", "checking and replace loose power point", and "hack floor and provide new equivalent 2 x 2 to floor" – these are restoration works, not "renovation" works.

Summary Of The Questions Posed For Determination

[20] First of all, I observe that the six questions that D posed for the Sessions Court to determine in encl. 65 are peculiar. I set out below the six questions posed, as expressed in D's own words:

(i) whether "renovation" is equivalent to "restoration", in law?

(ii) whether P, in law, needs an expert such as a building surveyor or other expert in construction, building or otherwise, to identify and certify that the alleged damage to the subject premises was caused by D?

(iii) whether the quotation dated 26 February 2018 by the contractor Nilai Cekal Sdn Bhd is a confirmation or identification, in law, concerning the damage allegedly caused by D to the premises?

(iv) whether the three payment receipts and the quotation adduced by P are, in law, for renovation or restoration of the subject premises?

(v) whether P and/or the contractor Nilai Cekal Sdn Bhd are, in law, experts who are qualified to identify or certify that the damage and the value of the damage amounting to RM38,001 were caused by D to the subject premises?

(vi) whether P is, in law, entitled to claim rent for December 2017 for RM2,800 and impose on D mesne profits at double rental for January, February, March, and April 2018 amounting to RM22,400, when para. 7 of P's statement of claim admitted that vacant possession of the subject premises was delivered on 30 November 2017 (*ie*, before December 2017)?

Analysis Of The Questions D Poses

[21] Concerning question (i) – D argues that in P's pleadings (the statement of claim), P pleaded that the works done (the costs of which P is claiming from D) were restoration (pemulihan) works. But, inconsistently, in P's answer to D's request for further and better particulars, P stated that his contractor performed "renovation" (pengubahsuaian) works. D asserts that he is not liable to pay for "renovation" works, as opposed to restoration works. D asserts that the Sessions Court correctly answered question (i) by finding that restoration is different from "renovation". And on that basis (or on that ground), P's claim should be struck out.

[22] I do not see how answering question (i) in that manner *ie*, restoration work is different from "renovation" works, leads to the conclusion that D is not at all liable to make good the premises when the tenancy was terminated.

[23] Also, to my mind, question (i) is not a question of law. It is a question of fact. It asks whether the contractor's works were restoration works (which P asserts that D is liable for) or "renovation" works (which D asserts he is not liable for).

[24] Concerning question (ii) – D asserts that P needs to produce expert evidence to prove that the alleged damage to the house was caused by D, and that the work that the contractor had done was merely restoration works and not "renovation" works (which D should not have to pay for). This assertion, to my mind, is D's admission that amidst the disputed facts, there must necessarily be a trial of this suit. Expert evidence has to be led. The issue of D's liability has to be canvassed and determined at trial, not summarily by affidavit evidence.

[25] Concerning question (iii) – D argues that the content of the contractor's quotation would verify whether D caused the alleged damage to the house. Similarly, this argument, against the disputed facts, necessarily requires a trial to determine – whether the content of the quotation discloses that D caused the alleged damage to the house.

[26] Concerning question (iv) – D argues that the content of the contractor's quotation and the three payment receipts prove either restoration works or "renovation" works were done. Again, to answer this question, there must necessarily be a trial, where perhaps the contractor – who issued the quotation and the payment receipts, and who performed the works – has to testify. And only from the contractor's evidence can it be decided whether the works done were in fact restoration works or "renovation" works.

[27] Concerning question (v) – D submits that it must be decided whether P or the contractor is qualified to certify that the value of the damage allegedly caused by D was RM38,001. Yet again, to address this question and to answer it, there must be a trial, for the court to evaluate the evidence.

[28] Concerning question (vi) – D argues that P is not entitled to claim rent for December 2017, nor for mesne profits for January to April 2018, because the vacant possession of the house was given to P in November 2017. Again, to address and answer this question, a trial is required. A trial is necessary for all the pertinent and sufficient evidence to be produced

[29] I find that the six questions posed – taken separately or together – are not questions of law or construction of a document or questions of fact:

(i) that are "suitable for determination without the full trial", or

(ii) which "will finally determine the entire cause or matter", or

(iii) which "substantially dispose of the cause of matter", or

(iv) which "renders the trial unnecessary".

Sections 93 And 94 Of The Evidence Act 1950

[30] I would like to discuss another issue that D raises. D tangentially cites ss. 93 and 94 of the Evidence Act 1950 to argue that it cannot be ascertained whether the quotation and the three payment receipts were for restoration or for "renovation" of the house.

[31] For reference, I looked at ss. 93 and 94, which are set out below:

> **Section 93. Exclusion of evidence to explain or amend ambiguous document.**
>
> When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.
>
> ILLUSTRATIONS
>
> (a) A agrees in writing to sell a horse to B for RM500 or RM600. Evidence cannot be given to show which price was to be given.
>
> (b) A document contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled
>
> **Section 94. Exclusion of evidence against application of document to existing facts.**
>
> When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

ILLUSTRATION

A conveys to B by memorandum of transfer "my estate at Kranji containing 100 acres." A has an estate at Kranji containing 100 acres. Evidence may not be given of the fact that the estate meant was one situated at a different place and of a different size.

[32] I am compelled to say that I find D's point incomprehensible. I cannot see how ss. 93 and 94 apply to the issues that arise from using the O. 14A or O. 33 procedure to pose questions of law or construction of a document to pre-empt a trial.

[33] I resorted to asking D questions at the hearing. But even though I asked D questions at the hearing, D could not assist me in understanding his point. I am therefore of the view that D's reliance on ss. 93 and 94 is misplaced.

[34] It is obvious to me that the quotation and the payment receipts, as documentary evidence, need to be tendered at trial, perhaps by the contractor who issued them, to prove the facts contained in these documents. This necessarily requires a trial.

My Findings

[35] I now look to the document that contains the rights and obligations of the parties. After all, this is a landlord-tenant dispute. And so I peruse the tenancy agreement. The pertinent clauses in the tenancy agreement include:

(i) clause 4(c): D, as the tenant, is not to make any structural or material alterations to the house;

(ii) clause 4(u): D is prohibited from subletting the premises. There is an issue arising about D using the premises to run a homestay business *ie*, letting the house out for a profit;

(iii) section 7 of the schedule to the tenancy agreement states that the house is to be used as a residence; and

(iv) clause 4(v): when the tenancy ends, D must "restore" the premises to "its original positions (*sic*) if any structural alterations or additions have been made".

[36] I reiterate that there should be a trial – for parties to present the evidence of their conduct and to challenge the opposite side's conduct in relation to the parties' rights and obligations under the tenancy agreement. There should be a trial for parties to establish that the opposite side is the party that has breached the terms of the tenancy agreement.

[37] I find that there are numerous disputed facts, which render the O. 14A or O. 33 procedures inappropriate.

[38] Under O. 14A – I find that the questions posed by D are not "suitable for determination without a trial". I also find that the questions posed do not "finally determine the entire case", namely the claim and the counterclaim.

[39] Under O. 33 – I find that O. 33 is even less suitable here. I find that the answers that may be given to the questions posed do not "substantially dispose of the matter". I also find that the answers that may be given to the questions posed do not "render the trial unnecessary". Instead, a trial is required to decide on the claim and the counterclaim, since there are diametrically opposed assertions of fact.

[40] I find that the questions posed are incongruous with the purpose and requirements of both O. 14A and O. 33 procedures.

Conclusion

[41] For these reasons, I allow P's appeal against the Session Court's order, which not only summarily struck out P's writ and statement of claim, but also allowed D's counterclaim, without D even praying for it in encl. 65. D's application in encl. 65 did not pray for the counterclaim to be allowed in favour of D against P.

[42] The effect of such an order is seriously prejudicial to P. D's counterclaim was not determined by way of a trial. D's counterclaim was not even granted summarily *ie*, by summary procedure, where P could have been allowed to properly produce and present affidavit evidence to defend against the counterclaim. In this regard, I find that the Sessions Court has disregarded the fundamental principles of procedural law and substantive justice.

[43] I set aside the Sessions Court's order dated 29 December 2020. I order D to pay P costs of RM12K for this appeal proceeding and the encl. 65 proceeding in the Sessions Court, by 19 July 2024. And I set aside the Sessions Court's order for costs that P pays D RM5K costs for the encl. 65 proceeding. All costs are subject to the allocatur.

[44] I direct the Sessions Court to call this matter up for case management at the earliest opportunity, and in any event before 19 July 2024, for the Sessions Court to case-manage this suit and to progress it to trial.